September 1998

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https://doi.org/10.15779/Z38X92K

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FORUM

Labor Arbitration: Past, Present, and Future

This forum consists of the transcripts of two lectures on labor arbitration. The first, given by Boalt Hall Law Professor David Feller before a symposium of the Federal Mediation and Conciliation Service, traces the history of labor arbitration from the Taft-Hartley Act to the present. The second, given by Hastings College of Law Professor Joseph Grodin at Boalt Hall School of Law discusses the interjection of employment law issues into labor law through the arbitration process. Both lectures have been edited and modified slightly. Although footnotes have been added, citations should be taken as illustrative of—and not as comprehensive of—issues discussed in the text.

Taft and Hartley Vindicated: The Curious History of Review of Labor Arbitration Awards

David E. Feller†

The occasion for this symposium is the 50th birthday of the Federal Mediation and Conciliation Service (FMCS). The service was created as an independent agency by the Labor Management Relations Act of 1947. That Act, sponsored by Representative Hartley in the House and by Senator Taft in the Senate was denominated the “slave labor act” by organized labor and passed over President Truman’s veto. Section 301 of the Act gave federal courts jurisdiction over suits for violation of collective bargaining agreements. It is perhaps a demonstration of the law of unintended consequences that the FMCS emerged as the effective agency it became, and that—according to the conventional wisdom—Section 301 came to aid organized labor by elevating labor arbitration to a new and exalted status.

† John H. Boalt Professor of Law Emeritus, University of California School of Law. This is a slightly amended text of a talk delivered at the National Symposium of the Federal Mediation and Conciliation Service on September 1, 1997. Footnotes have been added.


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Because these fifty years are fifty years of Section 301, I want to ad-
dress the way in which Section 301 has affected labor management arbitra-
tion and conclude that perhaps, using hindsight, it is possible to conclude
that the conventional wisdom is wrong.

In preparing for today’s talk I went back and read again Dean Harry
Shulman’s famous 1955 Oliver Wendell Holmes lecture entitled “Reason,
Contract, and Law in Labor Relations.” As I read it I marveled. It is an
insightful, penetrating, and beautiful description of the function of labor
arbitration. It deserves reading and re-reading today, more than 40 years
later, by anyone involved in the arbitration process. Every arbitrator, I
think, should have a copy of it on his desk to remind him of the function
that arbitration performs in the collective bargaining relationship.

Unfortunately, Harry Shulman’s speech is often remembered for only
one thing: his conclusion that the law should stay out. Let me quote Shul-
man’s concluding paragraph:

The arbitration is an integral part of the system of self-government. And
the system is designed to aid management in its quest for efficiency, to
assist union leadership in its participation in the enterprise, and to secure
justice for the employees. It is a means of making collective bargaining
work and thus preserving private enterprise in a free government. When it
works fairly well, it does not need the sanction of the law of contracts or the
law of arbitration. It is only when the system breaks down completely that
the courts’ aid in these respects is invoked. But the courts cannot, by occa-
sional sporadic decision, restore the parties’ continuing relationship; and
their intervention in such cases may seriously affect the going systems of
self-government. When their autonomous system breaks down, might not
the parties better be left to the usual methods for adjustment of labor dis-
putes rather than to court actions on the contract or on the arbitration
award? I suggest that the law stay out—but, mind you, not the lawyers.2

Shulman made that speech in 1955. Unfortunately for his desire that
the law stay out, Congress in 1947 had determined otherwise. The Taft-
Hartley Act, as it became known, overhauled the National Labor Relations
Act, adding union unfair labor practices and strengthening employer rights.
It also in Section 301 made collective bargaining agreements enforceable in
the federal courts. The House committee report said that the purpose of the
statute was to reduce industrial strife.3 The Senate committee report said
that the objective was to equalize existing laws between labor and manage-
ment.4 The two objectives coincided with respect to Section 301 because it
was assumed in the committee reports and in the debate in both houses that
the only violation of collective bargaining agreements that required reme-

1. 68 Harv. L. Rev. 999 (1955).
2. Id. at 1024.
dial action was a violation of a no-strike agreement by the union. A meticulous search of the legislative history in both houses can uncover no hint that anyone in the Congress believed that legislation was necessary to deal with employer violations of collective bargaining agreements. But even the 80th Congress could not quite bring itself to simply say that only unions could be sued. The law had to at least look even-handed. And so the final enacted language provided that suits for breach of a collective bargaining agreement could be brought in the federal courts, presumably by both unions and employers, although it is quite clear from the legislative history that it was not anticipated that Section 301 would ever be used by unions against employers. In the 80th Congress's view the only parties who ever violated collective bargaining agreements were unions.

For a period of time it appeared that what Congress sought to accomplish might in fact be what it did accomplish: suits for violations of no-strike clauses by unions were entertained by federal courts. But when the first case in which a union sought to enforce a collective bargaining agreement came to the Supreme Court, the Court said that the federal courts had no jurisdiction over such suits. I know Westinghouse well because I lost it. The case was precisely the kind of case which Harry Shulman thought should not be heard in the courts: a claim by the union that the employer had improperly docked the pay of employees covered by a collective bargaining agreement. Arbitration was not involved. It is impossible to state with precision exactly what the Court held because there was no opinion for the Court. There were three opinions for the majority and a dissent. The principal opinion was by Mr. Justice Frankfurter, with whom two justices concurred. In his view the rights of employees under a collective bargaining agreement were governed by state law and Congress could not, by simply enacting a jurisdictional statute, constitutionally give the federal courts jurisdiction over claims that were governed by state law. To avoid that constitutional problem, he concluded, Section 301 should be construed as not providing jurisdiction over union suits on behalf of employees.

Westinghouse did not survive; it was eventually overruled in Smith v. Evening News Association, a case involving a collective bargaining agreement which the court assumed, erroneously, did not involve arbitration. Evening News held that individual employees could sue under Section 301 and the courts would determine whether the collective bargaining agreement was violated. But the evil of judicial interpretation and enforcement

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7. See id. at 459-61.
9. See id. at 200-01.
of collective bargaining agreements that Shulman feared did not eventuate. It didn’t because the court finally reached cases involving arbitration. As William Murphy, President of the National Academy of Arbitrators said ten years ago in his presidential address to the Academy, “in another ironic twist, the Supreme Court and the law intervened for the very purpose of achieving Shulman’s goal, to keep the law out.”10

The groundwork for that revolution was laid in Textile Workers v. Lincoln Mills.11 In that case, in what might be said to be a feat of judicial legerdemain, the Court said that Section 301, although phrased as simply a jurisdictional statute, provided the basis for the creation of a federal substantive common law governing the collective bargaining agreement.12 At first that decision aroused precisely the fears that Dean Shulman had expressed. Courts, it was feared, would be engaged in the interpretation and application of collective agreements. But Lincoln Mills was not the end. Three years later, in what has been called the Steelworkers Trilogy,13 the Court essentially achieved the result which Shulman had advocated. Where there was an arbitration provision in a collective bargaining agreement, the Supreme Court said, the courts should stay out, first by enforcing the agreement to arbitrate14 and second by enforcing an arbitrator’s decision without review of its merits.15 Since arbitration was almost universally provided for in collective bargaining agreements, the net effect was that the law was indeed out and arbitration was in. All doubts were to be resolved in favor of arbitration where the question was whether the agreement to arbitrate should be enforced16 and all doubts were to be resolved in favor of sustaining the arbitrator’s award so long as the arbitrator was construing and applying the terms of the collective bargaining agreement.17

And so the Congress that was anxious to punish unions by enacting Section 301, with the aid of the Supreme Court, in fact kept the law out and gave unions an effective alternative to what Shulman called the usual method of adjustment of labor disputes—i.e., the strike. Section 301 has been used primarily by unions. There have been many fewer suits against unions for breach of the no-strike clause. What Taft and Hartley did not recognize was that, so long as a collective bargaining relationship continues to exist, a successful damage suit against a union is counterproductive in the

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12. Id. at 456.
14. See, e.g., Warrior & Gulf, 363 U.S. at 582-83.
15. See, e.g., Enterprise Wheel & Car, 363 U.S. at 596.
16. See, e.g., Warrior & Gulf, 363 U.S. at 582-83.
17. See, e.g., Enterprise Wheel & Car, 363 U.S. at 596.
long run in most situations. The court may award damages but eventually the contract will expire and a large damage verdict is virtually uncollectible if there is to be a settlement in subsequent negotiation. The agreement between Pittston Coal and the Mineworkers to void the damages imposed on the union for contempt of court during the lengthy Pittston strike is an example of that truth.\textsuperscript{18} In William Murphy’s words, Section 301—via the \textit{Steelworkers} Trilogy—"elevated arbitration [and he meant labor arbitration] to a new status."\textsuperscript{19}

That is the conventional wisdom. In fact, however, precisely the opposite may now be true. Section 301, it has now turned out, may have relegated labor arbitration to a lower status than would otherwise have been the case. It is true of law as it is true generally: no one can predict the future. And the future of arbitration was certainly unpredictable in 1957 when \textit{Lincoln Mills} was decided. At that time there was on the books another statute potentially applicable to arbitration under a collective bargaining agreement: the Federal Arbitration Act, passed in 1925. That statute excluded from its ambit "contracts of employment . . . of workers engaged in foreign or interstate commerce."\textsuperscript{20} Whatever the scope of that exclusion as applied to individual contracts of employment—a question still as yet undecided by the Supreme Court—one thing is clear: a collective bargaining agreement is not a contract of employment.\textsuperscript{21} The First Circuit had so concluded in a companion case to \textit{Lincoln Mills}.\textsuperscript{22} So the Federal Arbitration Act was potentially available as a basis for enforcing an agreement to arbitrate in a collective bargaining agreement.

In \textit{Lincoln Mills}, the Supreme Court, however, was persuaded by Arthur Goldberg, with an assist from me,\textsuperscript{23} to rest its decision as to the enforceability of the agreement to arbitrate on Section 301. Why? Precisely to elevate the status of labor arbitration above that of arbitration under the Federal Arbitration Act. At the time, although the Federal Arbitration Act was on the books, arbitration was not favored. As the Supreme Court has since said, there was an "outmoded presumption of disfavoring arbitration proceedings."\textsuperscript{24} And so it seemed desirable in 1957 to rest the enforcement of the promise to arbitrate, and the enforcement of awards once made, on federal labor policy, as the Court did in \textit{Lincoln Mills}.\textsuperscript{25} The seed planted

\begin{itemize}
  \item \textsuperscript{18} See International Union, United Mineworkers of America v. Bagwell, 512 U.S. 821, 825 (1994).
  \item \textsuperscript{19} \textsc{Murphy, supra note 10}.
  \item \textsuperscript{20} \textsc{9 U.S.C. Section 1 (1994 Ed.)}.
  \item \textsuperscript{22} \textit{Local 205, United Electrical Radio and Machine Workers of America (UE) v. General Electric Company}, 233 F.2d 85, 98 (1956), \textit{aff'd} (on Section 301 grounds) 353 U.S. 547 (1957).
  \item \textsuperscript{23} I wrote the brief in \textit{Lincoln Mills}.
  \item \textsuperscript{24} \textit{Rodríguez de Quijas v. Sheardón/American Express, Inc.}, 490 U.S. 477, 481 (1989).
  \item \textsuperscript{25} \textit{Lincoln Mills}, 353 U.S. at 454-55.
\end{itemize}
there led to fruition in the Steelworkers Trilogy, where the Court said that where labor arbitration was involved, "the hostility evinced by courts to arbitration of commercial disputes has no place here." And for that reason all doubts should be resolved in favor of coverage: an order to arbitrate should not be denied unless it can be said with positive assurance the agreement did not cover the grievance sought to be arbitrated.

So, as of 1957 with Lincoln Mills and as of 1960 with the Steelworkers Trilogy, arbitration was in a preferred, if not exalted, status. But then there was a revolution under the Federal Arbitration Act. The hostility toward arbitration of commercial agreements that the court had referred to in the Steelworkers Trilogy not only disappeared, it was turned upside down. In 1957 the Court in Lincoln Mills had turned Section 301, which appeared on its face to be a jurisdictional statute, into a substantive one overriding state law. Just so the Court in 1984, in Southland Corp. v. Keating, turned the Federal Arbitration Act, which had been enacted as a procedural statute governing the federal courts, into a substantive statute overriding state law. A state law providing statutory protections and prohibiting arbitration of claims of their violation was held to be unconstitutional because it was contrary to federal law. As to arbitrability, the Supreme Court in 1983 declared in words almost identical to those in Warrior & Gulf that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitrability. Today the lower courts and even the Supreme Court cite labor cases indistinguishably from cases under the Federal Arbitration Act in determining whether to order arbitration.

So, in terms of ordering arbitration to take place, Section 301 is not any different than commercial arbitration under the Federal Arbitration Act. But what about the other end of the equation, the enforcement of awards once made? Here the shoe is on the other foot. Although the courts were traditionally hostile to the enforcement of agreements to arbitrate, allowing either party to disavow the agreement prior to the actual arbitration, the common law was clear that once a dispute had been arbitrated the award was to be enforced no matter how outrageous the court might believe it to be. And that rule was carried forward into the Federal Arbitration Act. Under Section 10 of that Act an award can be set aside only, in reality, if

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26. Warrior & Gulf, 363 U.S. at 578.
27. Id. at 582-83.
32. See id.
one can show corruption, bias or fraud. That a court is convinced the award is wrong, even plainly wrong, is not a ground for setting it aside.

What about labor arbitration under section 301? Mr. Justice Douglas, in the third case of the Steelworkers Trilogy, Enterprise Wheel & Car, said that an award must be enforced under Section 301 so long as it draws its "essence" from the collective bargaining agreement. What he meant, I think, is only what he said immediately before, that "an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice." But he added that "essence" language.

What an unfortunate choice of words. One man's essence may be another man's (or a court's) nonsense! And so many of the lower federal courts began to second-guess the arbitrator in cases under Section 301. As the Sixth Circuit put it in 1987,

[T]here may be a departure from the essence of the agreement if (1) an award conflicts with the express terms of the collective bargaining agreement, (2) an award imposes additional requirements that are not expressly provided in the agreement, (3) an award is without rational support or cannot be rationally derived from the terms of the agreement, and (4) an award is based on general considerations of fairness and equity instead of the precise terms of the agreement.

Courts asked to enforce arbitration awards also developed a second line of attack under Section 301: public policy. At common law an agreement to do an illegal act was unenforceable as against public policy. This was picked up as a method of vacating labor arbitration awards. When an arbitrator under a collective agreement ordered reinstatement of an employee who had committed an offense on the ground that there was no due process, or that the agreement had been discriminatorily applied, or that there were mitigating circumstances, the lower courts began to set aside the awards if what the employee did was against public policy, even though what the arbitrator awarded, reinstatement, did not violate any law or public policy.

Both avenues of attack came to the Supreme Court in 1989 in Misco. The Court granted review to settle the public policy question of whether the arbitration award could be set aside on public policy grounds because what the discharged employee did was against public policy or only because what the arbitrator ordered the employer to do would violate the law. But

37. Enterprise Wheel & Car, 363 U.S. at 597.
38. Id.
41. See id. at 35.
all the Court did was reiterate in dictum that the public policy invoked had to be based on laws and not on general consideration of supposed public interest. It was dictum because the Court first held that the lower court had no business overruling the arbitrator’s finding that the employer had not satisfactorily proved that the employee committed the offense charged. In so doing, the Court seemed to kill the growing tendency of some of the lower federal courts to vacate awards they didn’t like: “[A] court should not reject an award on the ground that the arbitrator misread the contract.” The Court continued, “as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.”

That, one might think, should have settled the question. But think again. Although most circuits have gone along, others have not. They duly recite the limited nature of review under Section 301, but then go on and employ a “plain meaning” rule: if the arbitrator construes the language of a collective bargaining agreement in a way which a court believes is simply wrong, or, in the words of the Fifth Circuit, if he took action “contrary to express contractual provisions,” then the award will be set aside. The First and Sixth Circuits have joined in. As the Sixth Circuit put it, “[a]n award fails to derive its essence from the collective bargaining agreement when it conflicts with the express terms of the agreement.” Of course, what the express terms of the agreement mean is what the parties have hired the arbitrator to determine. But the courts which follow the rule of the First, Fifth, and Sixth Circuits are saying that it is for the court, not the arbitrator, to decide what the express terms mean.

None of this, let me be quite clear, is applicable under the Federal Arbitration Act. Only when an arbitrator orders an illegal act can a commercial award be set aside under the Federal Arbitration Act as being contrary to public policy. The courts are quite explicit in saying that a contention that a commercial arbitration award under the FAA is contrary to the language of the agreement is not a ground for setting aside an award.

42. See id. at 43.
43. See id. at 39.
44. Id. at 38. Unfortunately, however, the Court also twice repeated the Douglas “essence” language. Id. at 36, 38.
45. Delta Queen Steamboat Co., v. District 2, 897 F.2d 746, 747 (5th Cir. 1989).
46. George Pacific Corp. v. Local 27, United Paperworkers Int’l Union, 130 L.R.R.M. (BNA) 2208 (1st Cir. 1983).
47. Ficks Reed Company v. Local Union 112 of the International Union, Allied Industrial Workers of America, AFL-CIO, 965 F.2d 123 (6th Cir. 1992).
48. Id. at 125.
50. Bernhardt v. Polygraphic Company of America, Inc., 350 U.S. 198, 203 n.4 (1955). “The federal courts, including this one, have unwaveringly followed this rule, and have consistently held that
So, as the law now stands in practice, if not in doctrine, there are two standards for vacating arbitration awards: under the Federal Arbitration Act only if an arbitrator deliberately and knowingly violates the law; under Section 301 if the arbitrator construes the agreement contrary to what a court believes its plain meaning to be or if the arbitrator orders reinstatement of an employee who committed an offense against public policy. The First Circuit, in Advest, Inc. v. McCarthy, rejected a contention based on Section 301 cases that a commercial arbitration award should be vacated, saying there are "two classes of cases where an arbitral award is subject to review": 

51. "[o]ne category, usually involving labor arbitration, is where an award is contrary to the plain language of the collective bargaining agreement"; "[t]he second category embraces instances where it is clear from the record that the arbitrator recognized the applicable law—and then ignored it,” citing commercial cases.  

52.

Let me illustrate the difference between arbitration under the two statutes by describing two cases. The first involves an airline pilot who, contrary to federal regulations and company rules, flew an airplane while under the influence of alcohol.  

53. Under the regulations, a pilot who commits that offense loses his license.  

54. If, however, he enters a rehabilitation program and satisfies the Federal Aviation Agency that he has successfully brought his alcohol problem under control, it can re-issue his license under very strict conditions, including random testing.  

55. A pilot was discharged as a result of drinking and the arbitrator found that the company violated its own rules and that others in the crew who had persuaded him to fly over his reluctance were not punished.  

56. Because of the disparate application of the rules, the arbitrator, a former president of the Academy, ordered the pilot reinstated, but only if, as, and when the Federal Aviation Agency satisfied itself that he was able to fly safely and re-issued his license.  

57. The Eleventh Circuit Court of Appeals, after Misco, set aside the award as contrary to commercial cases.
public policy. The Court of Appeals for the District of Columbia Circuit had come to the opposite conclusion in a case involving Northwest Airlines. The Supreme Court declined to review either decision.

The second case involves an employee who had to leave work to pay her bill in order to get the power in her home restored. She made up a story in order to get permission to take an unexcused absence from work for forty-five minutes. The company found out that she had made up the reason for leaving work and fired her. Under the collective bargaining agreement, immediate discharge without prior warning was permitted only for specified offenses, one of which was "immoral conduct." The arbitrator found that what she did was not "immoral conduct," and reduced the discharge to a suspension. The Fifth Circuit set aside his award on the ground that lying was by definition "immoral conduct," and that the arbitrator therefore had no jurisdiction to reduce the penalty.

A petition for certiorari was filed in Bruce Hardwood Floors. Ordinarily there would be little hope that the Supreme Court would take the case. Reciting the appropriate doctrine, as the Fifth Circuit did, before proceeding to grossly misapply it, usually insulates a decision from review. The Court, simply put, does not sit to correct error and it has denied review in many of the cases that erroneously set aside labor arbitration awards.

But there appeared to be hope. Both the American Arbitration Association and the National Academy of Arbitrators filed amicus briefs urging a grant because the case was just the last of a whole series of cases misapplying the Court's doctrine. The Academy's brief urged the Court to expressly declare that the standard for review of an arbitration award under the Federal Arbitration Act should be applied under Section 301. The hope was in vain. The Court denied the petition.

So I return to my original thesis. The 80th Congress surely did not intend by enacting Section 301 to elevate labor arbitration to an exalted
status. The Supreme Court clearly did. But the Court subsequently did the same and more for commercial arbitration under the FAA. Messrs. Taft and Hartley have been vindicated; they can be acquitted retroactively of creating by inadvertence a result that they did not intend. We can now say, looking backward, that because of the Supreme Court's recent embrace of arbitration under the Federal Arbitration Act the law governing labor arbitration would be more favorable to labor arbitration and to unions if Section 301 had never been passed.

68. Of the reported challenges to arbitration awards under section 301 between 1960 and 1989, 80% were to awards in favor of the union. 30% of them were successful. In contrast, 20% of the challenges were to awards in favor of the employer and only 13% were successful. See Peter Feuille, et al., Judicial Review of Arbitration Awards: Some Evidence, 41 Lab L. J. 477, 480-82 (August 1990).